Postal Regulatory Commission
Submitted 1/13/2012 4:18:35 PM
Filing ID: 79638
Accepted 1/13/2012

BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Review of Nonpostal Services **Docket No. MC2008-1 (Phase IIR)**

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DATED: January 13, 2012

Pitney Bowes Inc. (Pitney Bowes) respectfully submits these comments in response to Order No. 1043, which seeks comments on the legal issues remanded by the D.C. Circuit in *LePage's 2000, Inc. and LePage's Products, Inc. v. Postal Regulatory Commission*, 642 F.3d 225 (D.C. Cir. 2011).

I. INTRODUCTION

The Postal Service has historically experimented with business ventures outside its core function - the delivery of physical mail. In the late-1990s and early-2000s, the Government Accountability Office issued a series of reports chronicling these activities and concluded that the majority of these nonpostal services had not been profitable, had resulted in the distortion of private markets, and had diverted Postal Service resources from its core responsibilities and competence.[1] The 2003 report of the President's Commission on the Future of the Postal Service reached the same conclusions.[2]

Congress responded in 2006 by enacting the Postal Accountability and Enhancement Act (PAEA).[3] Under the PAEA, a "postal service" is "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto." 39 U.S.C. § 102(5). Under the Act, a "nonpostal service" is "any service that is not a postal service." 39 U.S.C. § 404(e)(1). The PAEA repealed the Postal Service's authority to offer new "nonpostal services" and permitted nonpostal service it had offered as of January 1, 2006, to continue only if the Commission determined the service met a "public need" that cannot be satisfied by the private sector. *See* 39 U.S.C. § 404(e).

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[1] *See U.S. Postal Service: Development and Inventory of New Products*, GAO/GGD-99-15 (Washington, D.C.: Nov. 24, 1998); *U.S. Postal Service: Update on E-Commerce Activities and Privacy Protections*, GAO-02-79 (Washington, D.C.: Dec. 21, 2001); *U.S. Postal Service: Postal Activities and Laws Related to Electronic Commerce*, GAO/GGD-00-188 (Washington, D.C.: Sept. 7, 2000).

[2] *See Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service*, Report of the President's Commission on the United States Postal Service (Jul. 31, 2003), at 27-28.

[3] *See* Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006). The PAEA amends various sections of title 39 of the United States Code. Unless otherwise noted, section references in these comments are to sections of title 39.

As required by the PAEA, the Commission engaged in a comprehensive review of all nonpostal services to determine whether they met the statutory criteria for continuation. The Commission conducted the review in two phases. In Phase I, the Commission reviewed all previously unregulated revenue-generating services to determine whether they were postal or nonpostal and grandfathered a number of existing nonpostal services. The Commission concluded that licensing, "as a general service," should be authorized to continue as a grandfathered nonpostal service. Order No. 154 at 73.

At the same time, the Commission acknowledged that issues concerning licensing of a commercial nature had not surfaced until very late in the Phase I proceeding; thus, the Commission concluded that these issues needed to be

> explored systematically on a more complete record to enable the Commission to determine fairly whether to terminate or, alternatively, to authorize the continuation of such programs. . . . While the record does contain some information on [one] license, the Commission does not view it as sufficiently well developed to warrant deciding that issue ahead of deciding the broader issue of licensing of a commercial nature.

Order No. 154 at 75. As a result, the Commission deferred its full consideration of commercial licensing issues until the Phase II proceeding.

In Phase II, with the benefit of a fully developed record, the Commission refined its views on licensing. The Commission distinguished between different types of licensing activities engaged in by the Postal Service. Specifically, the Commission considered the purpose of the licensing activity and the nature of the licensed consumer good that was being offered in applying the statutory criteria under section 404(e)(3).

The Commission held that there was a public need for promotional licensing that the private sector could not meet. *See* Order No. 392 at 8. This type of licensing is illustrated by the Officially Licensed Retail Products (OLRP) program, in which the Postal Service sells branded

merchandise directly to customers at postal retail locations. *See* Order No. 154 at 49-50. The Court referred to this subset of licensing as the "Bears and Scales program." Op. at 5. For purposes of these comments, we use the generic term "promotional licensing." The primary purpose of this type of licensing is to promote the Postal Service's brand via novelty or affinity items that would not otherwise be provided by the private sector.

In contrast, the Commission found there is no public need for the Postal Service to engage in commercial licensing for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. *See* Order No. 392 at 25. The Court referred to this subset of licensing as the "Bubblewrap program." Op. at.3. For purposes of these comments, we follow the Commission's use of the generic term "commercial licensing." The primary purpose of this type of licensing is to generate revenue through the sale of commercial consumer goods. The promotional value, if any, is incidental. While the Commission recognized that commercial licensing shared some of the benefits of promotional licensing, it concluded that such benefits were outweighed by disadvantages unique to commercial licensing. It also found that any public need for commercial licensing of mailing and shipping products could be adequately met by the private sector, which provided similar or identical products. *See id.*

On petitions for review from the Postal Service and LePage's, the Court remanded the case back to the Commission to reconcile the differences between Order No. 154 in Phase I of Docket No. MC2008-1 and Order No. 392 in Phase II of the same docket.[4] Specifically, the Court directed the Commission to further explain its findings regarding the private sector's ability to meet the public need for commercial licensing of mailing and shipping supplies sold at nonpostal retail outlets.

[4] *See* Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, December 19, 2008, Order No. 154; Phase II Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, January 14, 2010, Order No. 392.

The Commission has posed three questions on remand: (1) whether the Commission may distinguish between licensing for promotional purposes and licensing for commercial purposes in assessing the private sector's ability to meet the public need for that service, (2) whether the Commission properly classified the licensing of mailing and shipping products sold at nonpostal retail outlets as a nonpostal service, and (3) how should the Commission assess the "public need" test for nonpostal services under section 404(e)(3)(A).

II. SUMMARY OF POSITION

This remand proceeding provides the Commission with the opportunity to more fully explain why it is appropriate for the Commission to review the purpose or type of licensing being offered in assessing whether different types of licensing activities meet a public need that cannot be met by the private sector. The Commission should affirm its finding that there is no public need for the Postal Service to engage in commercial licensing for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. This conclusion is justified on the basis of the Commission's finding that any public need for commercial licensing of mailing and shipping products could be adequately met by the private sector and is supported by the concerns identified regarding consumer confusion, market distortion, and unfair competition that are unique to this type of licensing activity.

The Commission should likewise affirm that the commercial licensing of mailing and shipping products offered for sale at retail locations other than Postal Service retail facilities is properly classified as a nonpostal service. In Order No. 392, the Commission correctly distinguished between the Postal Service's direct sales of mailing and shipping supplies (Ready Post) and the Postal Service's licensing activities. Moreover, the Commission was justified in

assessing *postal products* under a different test than the test applied to *nonpostal services*; indeed, the PAEA compels it to do so.

Finally, the Commission should use this remand to refine the scope of the public need test. Through section 404(e), Congress intended to strictly limit the Postal Service's ability to offer services and products unrelated to its core business. Consistent with this intent, the public need test must be narrowly defined. The Commission correctly held that there is no public need for the Postal Service to license mailing and shipping supplies for sale at nonpostal retail outlets. In reaching this conclusion, the Commission recognized that consumer and economic effects vary significantly depending on the purpose of the licensing activity and the nature of the licensed consumer good offered by the Postal Service. Consideration of the direct and indirect consumer and economic effects, including the potential for consumer confusion, market distortion, and unfair competition, appropriately informed the Commission's public need assessment.

III. DISCUSSION

A. The Commission Correctly Distinguished Between Licensing for Promotional Purposes and Licensing for Commercial Purposes.

1. The Commission's initial approval of licensing as a "general service" must be refined.

In Order No. 154, the Commission held that only the Postal Service can provide its own intellectual property and, thus, concluded that licensing, "as a general service," should be authorized to continue as a grandfathered nonpostal service. Order No. 154 at 73. This conclusion was overbroad and, as the Commission concluded in Phase II with the benefit of a more fully developed record, would have led to results that are contrary to the PAEA. On remand, the Commission should explain in more detail why its initial position had to be refined.

The need for refinement is amply demonstrated by the Postal Service's submissions. In the Phase II proceedings, the Postal Service contended that the Commission had approved the general conduct of licensing without regard to the nature of any future licensing activity. *See* USPS Phase II Initial Br. at 5-8. On appeal, the Postal Service took the same position, that the Commission's initial approval of the Postal Service's general licensing authority necessarily compels the approval of any future licensing activity, regardless of the purpose of the license, the nature of the goods being licensed, the identity of the seller of the licensed goods, or the location of the sale of the licensed goods. *See* USPS Brief to D.C. Cir. (Jan. 28, 2011)(USPS Appeal Br.) at 31-32.

Under this interpretation, the Commission had authorized the Postal Service to engage in a virtually limitless range of new nonpostal activities through the expediency of licensing arrangements, even though the Postal Service would be prohibited from providing the same activities directly under the PAEA. This view makes no sense. It subverts one of the clear purposes of the PAEA, to limit the Postal Service to its core mission. *See* Order No. 154 at 16-22 (setting out legislative history demonstrating a series of legislative initiatives focusing the Postal Service on its core business and severely limiting the Postal Service's authority to offer nonpostal services); *see also* Pitney Bowes Response to Order No. 126 (Nov. 24, 2008) at 19-30. Moreover, there is nothing in the plain language of the statute or the relevant legislative history to support the notion that Congress intended on one hand to focus the Postal Service on its core business while simultaneously authorizing a directly contradictory authority for the Postal Service to engage in nonpostal services through licensing arrangements. *See id*.

Such a potentially unlimited grant of licensing authority undermines section 404(e). Section 404(e) prohibits new nonpostal services and contemplates a one-time review to allow the

Commission to determine which then-existing nonpostal services may continue. *See* 39 U.S.C. § 404(e)(3). A general grant of authority for all future nonpostal licensing arrangements – however similar or dissimilar in nature from the licensing arrangements previously reviewed by the Commission – would undermine the basic notion of a grandfather and the PAEA's fundamental commitment to transparency, accountability, and confining the Postal Service to its core mission in the future.

Additionally, section 404(e)(3) requires the Commission to make a determination as to whether eligible "nonpostal services shall continue, taking into account— (A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service." 39 U.S.C. § 404(e)(3). Approval of licensing, "as a general service" without relation to any specific end product or group of end products effectively reads section 404(e)(3)(B) out of the statute. The question is not whether the private sector can license the Postal Service's intellectual property. That question is too abstract because it ignores the purpose and context of the statute. It is also flawed because it presupposes that all licensing activities are the same. They are not.

2. Order No. 392 explained why the public need and ability of the private sector tests apply differently to promotional licenses and commercial licenses.

Based on the augmented record and further briefing in Phase II, the Commission appropriately distinguished between different types of licensing activities based on the purpose of the license. While the Commission declined to undertake a review on a license-by-license basis as advocated by several parties, *see* Public Representative Phase II Initial Br. (Jul. 21, 2009) at 6; Pitney Bowes Phase II Initial Br. (Jul. 21, 2009) at 10-11, the Commission's Phase II Order recognized that different types of licenses must be assessed differently. *See* Order No. 392 at 8, 11. The Commission identified two primary categories of licensing activities, those that

serve a primarily promotional purpose (e.g., novelty and affinity items), and those that serve a primarily commercial purpose (e.g., mailing and shipping products).

The Commission concluded that licensing activities that serve a primarily promotional purpose should continue because they generate revenues in support of the Postal Service's mission and give recognition to Postal Service brands in a way that can not be met by the private sector. *See* Order No. 154 at 73; Order No. 392 at 8.

However, the Commission concluded that licensing activities for the sale of USPS-branded mailing and shipping products in nonpostal retail outlets did not meet a public need that could not be met by the private sector. *See* Order No. 392 at 25. The Commission acknowledged that commercial licensing shared some of the benefits of promotional licensing, but it concluded that any public need for commercial licensing of mailing and shipping products could be adequately met by the private sector and that the benefits associated with this type of licensing were outweighed by disadvantages unique to commercial licensing of mailing and shipping products. *See* Order No. 392 at 12-25. These conclusions were supported by detailed findings in Order No. 392. *See id*.

The Commission properly concluded that mailing and shipping supplies are widely available in the private sector and that the Postal Service's licensing activities would not expand the range or quality of the mailing and shipping supplies available to consumers. *See id*. at 16. This conclusion was supported by the evidence and conceded by the Postal Service on appeal. S*ee* USPS Appeal Br. at 51 ("the licensed products otherwise exist in the marketplace and presumably could be sold without the Postal Service brand."). In fact, the record evidence with respect to USPS-branded postage meter ink demonstrated that the Postal Service was offering the very same product that the private sector was already offering through the very same distribution

channels, only the packaging had changed. *See* Declaration of Peter Wragg, May 11, 2009, at ¶ 18, Ex. 2.

Additionally, evidence submitted by the Postal Service supports the Commission's conclusion that there is no public need for commercial licensing of USPS-branded mailing and shipping supplies for sale at nonpostal retail outlets. The record evidence confirmed that the Postal Service's licensing activities were not necessary to fill a void in the market or satisfy unmet consumer demand. Rather, the Postal Service stated that it had conducted "research to identify best-in class" incumbent private sector market participants and "[p]roducts already in the marketplace with a proven track record" to offer USPS-branded products. *See* USPS Responses to POIR No. 1, Question 11. In a response to a related question, the Postal Service stated:

> The Postal Service when evaluating a prospective licensee prior to the execution of any agreement looks at four criteria:
>
> - Their track record in the commercial marketplace as a licensee of a major brand
> - Their product presence in established commercial channels
> - Their current financial health and company history
> - Consumer brand recognition

Id., Question 12.

Thus, the Commission correctly concluded that the licensing activities in connection with USPS-branded mailing and shipping products did nothing to expand consumer access to these types of products, they merely served to displace products already being provided by the private sector – the very problem that the nonpostal limitations of the PAEA were intended to address. *See* Order No. 154 at 18-19 (citing H.R. 22, *The Postal Modernization Act of 1999*: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm., 107th Cong. 106-16 (1999)(testimony of E. Gleiman)).

The Commission also raised a number of concerns regarding potential consumer confusion, market distortion, and unfair competition that are unique to licensing activities for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. *See* Order No. 392 at 9, 19-23.

The Commission concluded that unlike purely promotional licensing, commercial licensing activities in connection with mailing and shipping products had the potential to mislead and cause consumer confusion. Evidence submitted by the Postal Service stated that its commercial licensing activities in connection with mailing and shipping supplies would lead consumers to "assume a certain level of quality and expertise with respect to products that bear the Postal Service's widely recognized and respected brand." *See* USPS Responses to POIR No. 1, Question 11(g). The Postal Service also stated that consumers would associate its commercial licensing activities and its brand with standards of "durability, legibility, and quality." *See* Declaration of Gary A. Thuro (Nov. 17, 2008)(Thuro Decl.), at 5. At the same time, the Postal Service sought to distance itself from the USPS-branded products in the market and disavowed any unique quality control or quality assurance with respect to its commercial licensing activities for USPS-branded mailing and shipping products. *See* Thuro Decl. at 5. On the basis of this record, the Commission concluded that the brand connection perceived by consumers was an illusion, not backed by any actual difference between USPS-branded mailing and shipping supplies and the private label brand of the same product. The Commission concluded that the commercial licensing activities in connection with USPS-branded mailing and shipping supplies served to confuse, rather than inform consumers. *See* Order No. 392 at 21-22.

The Commission also cited concerns regarding market distortion and unfair competition. The Commission identified two bases for these concerns: (1) the disconnect between consumer

perceptions and the actual product attributes in the market, and (2) the prospect of the Postal Service seeking to compete via licensed mailing and shipping products in markets in which it also exercises regulatory authority. As the Commission stated in Order No. 392,

> While licensing for primarily promotional purposes does not engender unfair competition in the marketplace, commercial licenses related to the Postal Service's operations will cause the type of impact on competition that Congress sought to eliminate in the PAEA. The Postal Service is a government agency having a monopoly over the carriage of the mail which gives it a perceived expertise over the packaging and preparation of that mail. By licensing its trademarks to third parties so that they can make and sell USPS-branded products related to postal operations, the Postal Service is effectively engaged in a commercial activity in direct competition with private firms which are necessarily deprived of the opportunity to compete on a level playing field; precisely the type of impact on competition that Congress sought to restrict in the PAEA when it limited the Postal Service to core activities, except where authorized after a Commission finding of need that could not be met by the private sector.

Order No. 392 at 23-24 (citing Order No. 154 at 19 and 21).

These concerns supported the Commission's finding that the Postal Service had failed to establish a public need for commercial licensing activities in support of USPS-branded mailing and shipping products sold at nonpostal retail outlets.

B. The Commission Properly Classified Commercial Licensing for the Sale of USPS-branded Mailing and Shipping Products at Nonpostal Retail Locations as a Nonpostal Service.

1. Commercial licensing activities are not a postal service.

Under the PAEA, a "postal service" is "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto." 39 U.S.C. § 102(5). Under the Act, a "nonpostal service" is "any service that is not a postal service." 39 U.S.C. § 404(e)(1). The terms are mutually exclusive. For purposes of the nonpostal review, the Commission defined the term "service" as an "ongoing, commercial activity offered to the public for purposes of financial gain." Order No. 154 at 71. This

definition was intentionally fashioned to "encompass[] all commercial, nonpostal services that gave rise to Congressional concerns without impinging on the Postal Service's core responsibilities." Order No. 154 at 15.

In Phase I, the Commission determined that licensing is not a postal service. *See* Order No. 154 at 71. Based on the testimony submitted by the Postal Service, the Commission concluded that licensing activities were important but were not "a prerequisite for fulfilling the Postal Service's core business functions." *Id.* at 72-73. This finding was reaffirmed in Order No. 171. *See* Order No. 171 at 4.

No party argued before the Commission that commercial licensing should be classified as a postal service. The Postal Service took the position that licensing was neither a postal service nor a service. *See* USPS Notice of Submission of Sworn Statement on "Nonpostal Services" (Mar. 19, 2008), at 28-30; *see also* USPS Response to Pitney Bowes Motion to Compel (Oct. 22, 2008) at 4, n.8 ("While licensing the use of the Postal Service brand is not a "service" within the meaning of section 404(e), the sale by the Postal Service of OLRP merchandise is"). Alternatively, the Postal Service requested the Commission approve its commercial licensing activities as nonpostal services. *See* USPS Response to Pitney Bowes Motion to Compel (Oct. 22, 2008) at 10. The reconsideration requests submitted by LePage's and the Postal Service several months after the Commission issued Order No. 392 argued that the commercial licensing of mailing and shipping products for sale at nonpostal retail outlets should be approved under section 404(e) as a nonpostal service. *See* LePage's 2000, Inc. and LePage's Products, Inc.'s Submission in Support of USPS' Motion for a Stay of Order No. 392 (Jul. 1, 2010); United States Postal Service Motion for Reconsideration of Order No. 392 Relating to the LePage's License Agreement (Jul. 16, 2010).

The argument that commercial licensing of mailing and shipping products for sale at nonpostal retail outlets should be classified as a postal service was raised for the first time by LePage's on appeal. *See* LePage's Brief to D.C. Cir. (Jan. 28, 2011) at 18. The Postal Service did not join this argument on appeal.

2. The Commission correctly distinguished between direct sales and licensing activities.

The Court references LePage's argument that its USPS-branded mailing and shipping products are similar to the mailing and shipping supplies that the Postal Service sells in its retail outlets under the ReadyPost program, and criticizes the Commission for failing to distinguish these products. *See* Op., at 12. The Court also suggests that the distinction the Commission advanced on appeal, based on the activity offered by the Postal Service (sales or licensing), is inconsistent with its analysis of the product attributes of the ReadyPost in Order No. 154. *See id.* However this part of the Court's opinion misses the mark.

As an initial matter, it is not fair to criticize the Commission for failing to respond to an issue that was never presented to it. As noted above, no party challenged the relative classification of these products in the prior administrative proceedings. Moreover, the Commission's Phase II Order *did* distinguish between the Postal Service's *direct sales* activities and the Postal Service's commercial *licensing* activities:

> A fundamental dichotomy exists within the PAEA between postal services such as the sale of ReadyPost packaging at post offices, and the nonpostal service of licensing Postal Service brands for use on retail mailing and shipping products. Under the PAEA, the former is a postal service rising to the level of a core business, the sales of which are directly managed by the Postal Service; the latter is a nonpostal service under the control of licensees and merchandisers which must be terminated unless, together with other factors, the Commission finds a public need for the service that the private sector is unable to meet.

Order No. 392 at 17.

For these reasons, the product-specific comparisons between ReadyPost items and USPS-branded mailing and shipping products for sale at nonpostal retail outlets are irrelevant. As the Court noted elsewhere in its opinion, for nonpostal services "[t]he Act requires the Commission to assess the . . . service "offered by" the Postal Service." Op. at 14. The service offered by the Postal Service under the ReadyPost program is the *direct sales* of mailing and shipping supplies to the public. Whereas, the service offered by the Postal Service under its commercial licensing activities in connection with mailing and shipping products sold at nonpostal retail outlets is the *licensing* of its intellectual property to third-party retailers.

Accordingly, the Commission reasonably distinguished between the Postal Service's direct sales activities in connection with the ReadyPost program and the Postal Service's commercial licensing activities in connection with USPS-branded mailing and shipping products for sale at nonpostal retail outlets. *See* Order 392 at 17.

3. The statutory tests for postal services and nonpostal services are different.

The Court's suggestion that the Commission erred in applying inconsistent standards is also mistaken. As noted above, for nonpostal services the focus on the activity being offered by the Postal Service flows directly from the PAEA, which directs the Commission to "review each nonpostal service offered by the Postal Service." 39 U.S.C. § 404(e)(3). In contrast, a product-level analysis is appropriate for items proposed for classification as postal services.[5] *See* 39 U.S.C. § 3642 (setting forth the criteria and considerations for approval of new postal service *products*). Accordingly, the Commission was justified in assessing the ReadyPost program, which sought approval as a postal service, under different criteria than it used to assess the

[5] Under section 102(6) a "product" is defined as "a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied[.]" 39 U.S.C. § 102(6).

continuation of commercial licensing for USPS-branded mailing and shipping supplies for sale at nonpostal retail outlets as a nonpostal service.

C. Consistent with the purpose of the 2006 Act, the "public need" test should be narrowly defined.

There is no dispute that Congress intended to focus the Postal Service on its core postal business by foreclosing any new nonpostal services and limiting the Postal Service's ability to offer existing nonpostal services. Consistent with this intent, the Commission should adopt a narrow "public need" definition.

In considering whether the Postal Service should be permitted to compete in nonpostal markets beyond its core mission, the PAEA requires the Commission to assess the "public need" for such nonpostal services, not the Postal Service's needs. The notion of "public need" articulated by the Commission in Phase I, however, too often conflated the needs of the Postal Service with the needs of the public. The Commission assessed "demand for the service, its availability, its usefulness, whether it is a customary business practice, or serves the efficiency of operations." Order No. 154, at 39. While the first three factors address public need, the last two focus exclusively on the Postal Service's needs. Similarly, in assessing the need for the OLRP program, the Commission noted that it "leverages the Postal Service brand, advertises and enhances its image, and, through the revenues generated, helps support the Postal Service's core mission." Order No. 154, at 49. These factors are focused almost entirely on the Postal Service's needs for offering a particular nonpostal service, not the public need for that service. A focus on revenue generation is inappropriate because it confuses the needs of the Postal Service (assuming the nonpostal service would in fact make a "profit" or contribution) with the public need specified in the PAEA. The Commission should focus its assessment more directly on the public need.

Related to the discussion above, *see supra* 7-11, the public need for a particular nonpostal service cannot be assessed in the abstract. Whether the nonpostal service being offered is a licensing activity or a sales related activity, the Commission must assess the public need or consumer demand for the service in relation to some end product or group of products. This analysis was implicit in the Commission's Phase I decision which described the benefits of the OLRP program, for example, with reference to the enhanced recognition of the brand that would be brought about by the availability of select novelty and affinity items (e.g., teddy bears). *See* Order No. 154, at 49-50. Because the licensing agreement itself conveys none of these benefits the Commission's analysis is premised on the effect of the licensed goods in the market. This analysis was further developed in Phase II, where the Commission explicitly distinguished between different types of licensing activities based on the purpose of the license and the nature of the product. *See* Order No. 392, at 11.

Assessment of the public need for a nonpostal service in relation to some end product or group of products is critical because it allows the Commission to consider the direct and indirect consumer and economic effects of the nonpostal service. For example, in the case of licensing it is clear that consumer and economic effects vary significantly depending on the purpose of the licensing activity and the nature of the licensed consumer good. Consideration of the direct and indirect consumer and economic effects, including the potential for consumer confusion, market distortion, and unfair competition, allowed the Commission to distinguish between different types of licensing activities. This, in turn, allowed the Commission to develop a more refined public need assessment. Express recognition of the importance of assessing consumer and economic effects as part of the public need assessment also explains the apparent inconsistency

in the application of the public need test to the OLRP program in Phase I and to commercial licensing in Phase II.

IV. CONCLUSION

For the reasons discussed above, the clear intent underlying section 404(e), the record before the Commission, and the Commission's specific findings in Order No. 392, the Commission should affirm its finding that there is no public need for the Postal Service to engage in commercial licensing for the sale of USPS-branded mailing and shipping products at nonpostal retail outlets. The Commission should likewise affirm that the commercial licensing of mailing and shipping products offered for sale at retail locations other than Postal Service retail facilities is properly classified as a nonpostal service. The Commission should adopt a narrowly defined public need test that addresses the consumer and economic effects of each nonpostal service under consideration.

Pitney Bowes appreciates the Commission's consideration of these comments.

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